8-3100-11266-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Richard J. McKinney,

Petitioner,

v.

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION

St. Paul Public Schools,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 11:00 a.m. on February 17, 1998 at the Office of Administrative Hearings in Minneapolis, Minnesota. The hearing was held pursuant to a Notice of Petition and Order for Hearing dated July 24, 1997. The record closed on February 27, 1998 when the last authorized brief was filed.

Nancy L. Cameron, Assistant General Counsel, St. Paul Public Schools, 360 Colborne Street, St. Paul, MN 55102-3299, appeared on behalf of the respondent. Jesse Gant, III, Gant Law Office, Flour Exchange Building, 310 South Fourth Avenue, Suite 500, Minneapolis, MN 55415, appeared on behalf of petitioner.

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner of the Department of Veterans Affairs shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity is afforded each party adversely affected to file exceptions and present argument to the commissioner. The parties should contact Gerald Bender, Minnesota Department of Veterans Affairs, 2XX Veterans Service Building, 20 West 12th Street, St. Paul, MN 55155, telephone (612) 297-5828 to ascertain the procedure for filing exceptions or presenting argument to the commissioner.

STATEMENT OF ISSUE

The issue in this case is whether the petitioner voluntarily discontinued his employment with the respondent by being absent from work without leave thereby losing his right to a veterans preference hearing under Minn. Stat. § 197.46 (1996).

Based upon all of the proceedings herein, the administrative law judge (ALJ) makes the following:

FINDINGS OF FACT

Petitioner is an honorably discharged veteran of the United States Army who was on active duty between February 13, 1968 and March 22, 1969.

On or about October 1, 1990 petitioner was employed by the respondent as a Baker I. He worked in the respondent's "district kitchen". The district kitchen was part of the respondent's food services department. Approximately 70 people were employed in the district kitchen. They prepared food items for the respondent's schools. Petitioner generally worked only during the school year when classes were in session. He was the only Baker I employed by respondent.

Petitioner was a member of the Teamsters Union, Local 320. His immediate supervisor was Terry Decker, a Food Production Supervisor in the bakery department. Decker's supervisor was Monica Bunde. Jean Ronnei was the Director of Food Services. She had ultimate authority over the district kitchen. Her offices were located in the same building where petitioner worked.

On June 21, 1995 the petitioner plead guilty to fifth degree misdemeanor assault (domestic abuse) which occurred on June 20, 1995. ISD Ex. 4. The misdemeanor carried a maximum penalty of 90 days in jail, a $700.00 fine, or both. Id. After his plea was entered, the Dakota County District Court stayed imposition of a sentence and placed petitioner on one year's probation to the county's community corrections office. The conditions of petitioner's probation were that he pay a $150.00 fine plus a $40.00 surcharge; have a domestic abuse and chemical dependency evaluation and follow any recommendations made; follow the rules of the probation department; and remain law abiding. Id at 6-7.

On June 28, 1995 petitioner underwent a chemical dependency evaluation. One of the evaluator's recommendations was that petitioner have chemical dependency treatment at Twin Town Treatment Center. ISD Ex. 2, Admission 6.

By August 25, 1995, petitioner had not yet contacted Twin Town and his probation agent ordered him to do so immediately. ISD Ex. 2, Admission 7. Petitioner subsequently called Twin Town and spoke to an intake worker. During that conversation petitioner stated that he would not stop drinking. As a result of his refusal to stop drinking, he was informed that he would not be accepted for treatment at Twin Town. Petitioner relayed this information to his probation officer. The probation officer concluded that petitioner's refusal to stop drinking violated the terms of his probation, and he reported petitioner's refusal to the district court on September 15, 1995. In his report, the probation agent recommended that the court continue petitioner's probation on the condition that he serve 15 days in jail with work release, use no

alcohol or illegal drugs, follow the recommendations of the prior chemical dependency evaluation, and complete DAP. ISD Ex. 3 at 1d.

On October 23, 1995 the district court vacated the prior stay of imposition of petitioner's sentence and set a review hearing for November 29, 1995. At the review hearing, petitioner denied having committed a probation violation. Consequently, a contested probation violation hearing was scheduled for January 11, 1996.

Late in December 1995 petitioner talked to Decker about his scheduled court appearance on January 11, 1996. He told her he might have to go to jail but that he probably would not need to take time off because he would serve his time after work hours. Furthermore, petitioner told her that he wasn't sure if he would be required to serve any time in jail but that incarceration was a possibility. At that time, Decker told him he would have to fill out a request for leave if he would be absent. Petitioner told Decker he didn't know how much time off work he would need or the dates when he would need it. She told him to complete a leave request form leaving the dates blank and make sure he informed Ronnei that he might need leave time if jailed. Petitioner believed that he likely would not be required to serve any time in jail and could obtain some form of work release if he was jailed. Therefore, he never obtained a leave request form or submitted a leave request to Ronnei for approval. He had no contact with her regarding the matter.

On Thursday, January 11, 1996, District Judge James M. Campbell found that petitioner had violated the terms and conditions of the stay of imposition set by Judge Leslie Metzen and that the violation was without cause, justification or any legal excuse. ISD Ex. 5 at 11. Consequently, Judge Campbell revoked the stay of imposition of sentence, and ordered petitioner to pay a $700.00 fine and serve 90 days in the Dakota county jail. The judge initially stated that he would stay execution of the sentence and place petitioner on probation for a period not to exceed two years on the condition that petitioner serve 15 days in jail, follow the recommendations of the chemical dependency evaluation and any after care recommended by any treatment program petitioner participated in, and abstain from the use of alcohol or any mood-altering chemicals of any kind throughout the period of his two-year probation. After the court announced the conditions upon which it would stay execution of petitioner's sentence, petitioner requested clarification and informed the court that he would rather serve 90 days in jail than complete chemical dependency treatment and necessary after care. The court accepted his request and remanded petitioner to the sheriff's custody for delivery to the county jail to serve his 90-day sentence. Before leaving the courtroom, petitioner requested work release which the judge denied. ISD Ex. 5 at 12-14.

After petitioner was taken to jail his wife telephoned the district kitchen to tell them what had happened in court. At that time she spoke to Bunde and told her that petitioner had been sentenced to jail for 90 days with no work-release privileges. Mrs. McKinney asked for a leave of absence form at that time. Bunde told her that she didn't do leaves of absence and did not know

how it worked. However, Bunde told Mrs. McKinney that she would inform Ronnei of her request for a leave of absence form. Bunde did not promise to mail a form to her. The next day, Bunde informed Ronnei about the court proceedings and Mrs. McKinney's request for a leave form.

On January 12, 1996, following Ronnei's discussion with the human resources department about petitioner's incarceration, Ronnei wrote to McKinney about his job. In her letter she stated her understanding that he was unavailable for work due to his incarceration, and advised him that he was deemed to have resigned his employment effective January 11, 1996. ISD Ex. 6. Her letter did not mention the Veterans Preference Act. Copies of the letter were mailed to petitioner by regular and certified mail and were received at the McKinney home on Saturday, January 13, 1996 Id. About two days later Mrs. McKinney showed petitioner a copy of Ronnei's letter. At that time petitioner told Mrs. McKinney to contact his union representative, June Del Castello. Neither the petitioner nor his wife had any other immediate communications with respondent's officials.

After McKinney learned that he was deemed to have quit his job, he decided to ask the district judge to grant him work release privileges. Pet. Ex. 7. On Friday, January 26, 1996, the judge granted his request in an order filed that day. Pet. Ex. 8. After the district judge granted him work-release privileges, McKinney did not request reinstatement or advise school personnel that he now was able to work.

On Monday, January 29, 1996 petitioner called Ronnei for the first time and asked about his status. At that time, Ronnei reiterated respondent's position that he had been deemed to have resigned from his employment, and she told him to contact his union if he had any other questions. At that time petitioner did not request any leave forms or inform Ronnei that he had work-release privileges.

After her letter of January 12, 1996, Ronnei forwarded the matter to the respondent's board of education for its action. ISD Ex. 10. At its meeting of February 6, 1996, petitioner's resignation was accepted by the board. ISD Ex. 11

Petitioner served 60 days in the Dakota county jail, his 90-day sentence having been reduced for good behavior. After he was released he did not immediately contact school personnel to discuss reemployment. Instead, he found other work.

On September 17, 1996 McKinney completed a request for reinstatement form asking that he be placed on a reinstatement register. ISD Ex. 7. The reinstatement register is only available to former employees who quit their jobs with the district.

On or about June 18, 1997, petitioner filed a petition with the commissioner of veterans affairs. In his petition he alleged that he had been removed from his employment with the respondent without notice of his right to a

veterans preference hearing and requested that the commissioner order back pay with appropriate interest, lost benefits, and reinstatement. Petitioner Ex. 1.

The bargaining agreement between the respondent and Teamsters Local No. 320, which represents the respondent's food service personnel, contains some of the rules applicable to respondent's employees. Article 19 of the agreement states in part as follows:

> SECTION 1. LONG-TERM LEAVES WITHOUT PAY: Leaves of absence may be requested, on the basis specified in Civil Service Regulations. The Food Service Director will reply to such requests within fifteen (15) calendar days after they are received in the Food Service Office.
>
> SECTION 2. SHORT-TERM LEAVES WITHOUT PAY: Short-term special leaves without pay, not to exceed two (2) weeks in duration, may be requested and will be considered by the Employer subject to the operational needs of the Employer and the ability to secure substitute help to satisfactorily maintain the particular assignment of the employee involved.
>
> Subd. 1 Applications for leaves must be submitted in writing to the Food Service Director at least forty-five (45) calendar days prior to the proposed start of the leave without pay and shall include the proposed period of the leave and purpose for leave.
>
> * * *

ISD Exhibit 17 at 27.

19. Respondent also had a written policy (No. A-113) governing leave requests. ISD Ex. 15. It supplements the leave provisions in the bargaining agreement. The policy states in part, as follows:

> Procedure for Excused Absence Without Pay:
>
> Any employee wishing to take personal business time must receive prior authorization from their supervisor. An employee must put requests in writing. For long-term or short-term leaves, follow these procedures. An employee who takes personal business time without prior approval will be subject to disciplinary action.

ISD Ex. 15 at 2.

20. Under the terms of the bargaining agreement, food service procedures and civil service rules, Ronnei was the only person authorized to grant a district kitchen employee a leave of absence. Petitioner was aware that he was required to obtain a leave without pay from Ronnei. Decker told him Ronnei's approval was necessary and the subject had been discussed previously at employee meetings petitioner attended. (Decker testimony). Petitioner admitted that he knew about long and short-term leaves and approvals. (Petitioner's testimony).

The civil service rules applicable to petitioner also address absences without leave. Article 19.C. states:

> Absence from duty without leave, or failure to report after leave has been disapproved or revoked and canceled by the appointing authority, shall be deemed a resignation of the employee on such leave, or cause for discharge; however, if the employee so charged shall show to the satisfaction of the appointing officer and the Civil Service Commission that such absence or failure to report was excusable, the Civil Service Commission may permit the employee's reinstatement in accordance with the reinstatement provisions of these Rules.

ISD Ex. 20.

22. Although the bargaining agreement, food service policies and civil service rules do not discuss late-filed leave requests, in a medical emergency, for example, Ronnei was authorized to grant tardy leave requests submitted by the employee or the employee's family members. Ronnei admitted that she could have informed Mrs. McKinney to come in and obtain a leave form. However, Ronnei had never granted leave requests for employees during their incarceration and she believed that it would be inappropriate to grant petitioner leave. Instead, she concluded, after discussions with human relations personnel, that petitioner's absence should be treated as a voluntary separation. Having made that decision, there was no purpose for informing petitioner or his wife that a late-filed leave request could be made.

23. Petitioner's supervisors never advised him that he was not required to obtain a leave of absence if he was incarcerated for only a short time. Also, petitioner's supervisors never told him he could use sick leave to cover his absence from work while in jail. Petitioner admitted that it would not be appropriate to use sick leave while in jail and civil service rules do not authorize the use of sick leave for that purpose. Food Service Policy No. A-112 authorizes sick leave for sicknesses, visits to medical providers, injuries, or the death of an immediate family member. Although civil service rules and employer policies do not contain an inclusive list of the reasons for which a leave of absence may be granted, leaves were never granted to employees to cover time in jail.

24. There is no evidence in the record suggesting that the petitioner was treated differently than other employees under similar circumstances or that the reasons given to him for deeming him to have resigned were a subterfuge to get rid of him.

25. Petitioner never requested time off work to obtain treatment for alcoholism.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

The administrative law judge and the commissioner of veterans affairs have jurisdiction in this matter and are authorized to decide the issues raised by the petition pursuant to Minn. Stat. §§ 14.50 and 197.481 (1996).

The parties received proper notice of the issues in this proceeding and the department of veterans affairs has complied with all relevant substantive and procedural requirements of statute and rule, and this matter is, therefore, properly before the administrative law judge.

Petitioner is an honorably discharged veteran for purposes of Minn. Stat. §§ 197.46, 197.447, and 197.481 of the Veterans Preference Act (VPA).

The respondent is a school district governed by the provisions of the Veterans Preference Act pursuant to Minn. Stat. § 197.46 (1996).

Minn. Stat. § 197.46 prohibits the removal of a veteran from public employment except for incompetency or misconduct shown after a hearing, upon due notice and upon stated charges in writing.

Under Minn. Stat. § 197.46 and Minn. R. 1400.7300, subp. 5 (1996) the petitioner has the burden of proof to establish, by a preponderance of the evidence, that he was removed from his employment with the respondent.

Petitioner failed to establish that he was removed from his employment with the respondent. On the contrary, the record shows that he voluntarily abandoned his employment when he requested incarceration and was absent from work without having an approved leave of absence, which, under the respondent's civil service rules, constituted a voluntary resignation under the respondent's civil service rules.

Because the petitioner voluntarily discontinued his employment, he was not removed from position within the meaning of Minn. Stat. § 197.46 and he is not, therefore, entitled to a veterans preference removal hearing or any notice of a right to such a hearing.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED: that the commissioner of veterans affairs DISMISS the petition of Richard J. McKinney requesting relief under the Veterans Preference Act.

Dated this 23rd day of March, 1998

_____

JON L. LUNDE
Administrative Law Judge

Reported: (Four tapes)

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The issue in this case is whether the petitioner was removed from his employment or voluntarily discontinued his employment pursuant to civil service rules treating an absence from work without leave (AWOL) as a constructive voluntary quit. The pertinent civil service rule, Sec. 19.C states:

> Absence from work without leave, or failure to report after leave has been disapproved or revoked and canceled by the appointing authority, shall be deemed a resignation of the employee on such leave, or cause for discharge; however, if the employee so charged shall show to the satisfaction of the appointing officer and the Civil Service Commission that such absence or failure to report was excusable, the Civil Service Commission may permit the employee's reinstatement in accordance with the reinstatement provisions of these Rules.

Pursuant to Section 19.C, petitioner was deemed to have resigned his employment with the respondent as a result of his absence without leave on and after January 11, 1996.

Pursuant to the provisions of the civil service rule, surrounding circumstances, and prior decisions of the commissioner, it is concluded that the petitioner voluntarily discontinued his employment on January 11, 1996, when he was voluntarily absent from work without leave.

In Mack v. Hennepin County, unpublished, 1996 WL 523818 (Minn. Ct. App. 1996), the court held that a veteran public employee who was deemed to have resigned after three consecutive days' absence pursuant to the provisions of a bargaining agreement had not been removed from his employment and was not entitled to notice and hearing under the VPA.

In Hodapp v. St. Louis County, OAH Docket No. 69-3100-6516-2 an administrative law judge concluded that a county employee absent from work without authorized leave due to the employee's incarceration had voluntarily discontinued his employment under civil service rules stating that an employee absent from work for three consecutive work days without leave would be deemed to have resigned. In reaching his decision the administrative law judge stated: "While there may be some hesitancy to say that Petitioner 'voluntarily' absented himself from the job, the fact is that his voluntary actions led to his incarceration. The County has not taken disciplinary action against petitioner for his unauthorized absence. It did not refuse to let him work. Under the circumstances, the absence must be treated as a resignation." Id at 7.

In a Decision and Order dated August 14, 1992, the commissioner affirmed the ALJ's finding that the petitioner had voluntarily discontinued his employment under the applicable civil service rule as a result of his absence from work without leave. Although the commissioner stated that constructive resignations do not "comfortably" fit within the usual categories of either "removal" by the employer, which would require notice under the VPA, or "voluntary resignation," which would not, the commissioner found that the petitioner in that case had not been removed. His conclusion was based, in part, on the fact that there was no evidence in the record suggesting that the county was acting in bad faith. Because the county's rule in that case was not adopted in an ad hoc manner, the commissioner agreed that the employee had voluntarily abandoned his employment by being absent from work without leave. The commissioner stated that a generally applied policy denying leaves for incarceration cannot be said to come within the purview of the VPA.

In this case, petitioner was deemed to have resigned from his job as a result of his absence from work without leave pursuant to the terms of governing civil service rules. As in Hodapp, there is no evidence that the respondent was acting in bad faith or that its decision to deem petitioner's absence from work without leave a resignation was a mere subterfuge to get rid of petitioner. Furthermore, in this proceeding, petitioner did not need to be absent. Had he been willing to undertake chemical dependency treatment ordered by the court he would have been incarcerated for only fifteen (15) days and most likely would have been permitted to have Huber, work-release privileges. Instead, petitioner asked to be incarcerated for 90 days. That was a voluntary decision he made at the time of his court appearance: he chose to abandon his job for 90 days so that he could continue drinking. His absence was wholly voluntary.

Petitioner argued that he should not be deemed to have resigned because his immediate supervisor, Terry Decker, advised him that he was not required to obtain a leave of absence due to the fact that he had enough cumulative sick leave (40 hours) to cover his expected confinement (15 days). Petitioner's testimony, which Decker repudiated, cannot be credited. None of the respondent's rules authorize employees to utilize sick leave while incarcerated,

and it is unlikely that any employer would permit employees to use sick leave while in jail because incarceration is not an illness. Furthermore, petitioner's actions are inconsistent with his testimony about Decker's alleged statements. When he asked to be incarcerated, he did not have his wife tell Bunde that he was on sick leave. Instead, he asked his wife to get a leave form. Also, petitioner initially never told Ronnei that Decker advised him he could use sick leave while in jail. He never mentioned that until this proceeding was commenced. Petitioner's testimony is simply not credible and must be rejected.

Petitioner challenges respondent's application of the AWOL rule on the grounds that he was unaware that his incarceration could lead to a determination that he had voluntarily quit. Petitioner's position apparently is that he should have been informed about the AWOL rule before he went to court on January 11, 1996.

Ronnei admitted that copies of the civil service rules were not given to employees. However, copies of the bargaining agreement were given to them and policies relating to leaves without pay were posted in the district kitchen and reviewed with the respondent and other employees.

As a general rule, public employers having rules which their employees are required to observe must make those rules known to their employees. If employees do not have notice of the rules, they cannot be expected to conform their behavior to them. Hence, employees must have fair notice, expressed or implied, that certain conduct will be grounds for adverse action. Carter v. United States, 407 Fd.2d 1238, 1244 (D.C.Cir. 1967), rehearing denied, December 13, 1968. Accord: Chambers v. Department of Social Services, 442 N.W.2d 369, 371 (Neb. 1989); Hamilton v. Love, 152 Ind. 641, 644, 53 N.E. 181 (1899); Staton v. AMEX Coal Co., 122 Ill. App. 3d 631, 634, 78 Ill. Dec. 28, 461 N.E.2d 612 (Ill. App. 1984); Cf. Bautch v. Red Owl Stores, Inc., 278 N.W.2d 328, 331 (Minn. 1979). Petitioner had notice that being AWOL would result in adverse action, and a reasonable person would expect severe consequences for taking an unapproved, 90-day leave.

In this case the ALJ is persuaded that the petitioner had fair notice that his absence from work could be grounds for discharge or other adverse action. He knew that he was required to request and obtain a leave of absence from Ronnei. That is required under the bargaining agreement and policies posted in the district kitchen. He received copies of the bargaining agreement and the need for a leave from Ronnei was discussed with him during staff meetings and in connection with his January 11 court appearance. Policy A-113 specifically states that an employee who takes personal business time without prior approval will be subject to disciplinary action, and under article 19 of the bargaining agreement respondent is authorized to discipline employees for good cause.

Petitioner cited no authority which makes notice of the city's civil service rule an indispensable prerequisite to deeming whether he voluntarily quit his employment. Because petitioner knew that a leave was required and that disciplinary action, including discharge, could be taken for his absence without leave, the ALJ is not persuaded that actual notice of the civil service rule was required under the circumstances. Employees know that unexcused absences are grounds for discharge and petitioner had noticed that his absence from work without approval could result in disciplinary action including discharge. Knowing that, he failed to follow instructions to request a leave of absence and then asked the court to be incarcerated for 90 days to avoid treatment. His action was wholly voluntary, unapproved and detrimental to the respondent. Under the circumstances the administrative law judge is persuaded that the respondent acted reasonably in deeming that petitioner quit his job.

Petitioner also argued, in effect, that he should have been given a leave of absence because civil service rules do not prohibit granting him a leave while incarcerated. Petitioner correctly points out that Ronnei was authorized to grant leaves for up to a year or more. Ronnei admitted that she could have permitted petitioner to file a tardy leave request. However, doing so would have made no practical sense because it had already been determined that petitioner did not have good cause for his absence and that it would be inappropriate and contrary to the respondent's best interests to grant a leave to him. As long as the action taken by the employer is exercised reasonably and uniformly the decision should be affirmed. Given the voluntary nature of petitioner's incarceration and his failure to obtain approved leave as he was instructed to do, the administrative law judge is persuaded that the respondent acted reasonably in deeming that he quit.

Petitioner also argued that he should have been informed that the initial decision to deem his absence from work a voluntary separation would be reviewed by the board of education. That argument is not persuasive. If there were some available procedures for challenging the decision made by Ronnei under civil service rules, employer policies or the bargaining agreement, petitioner was responsible for invoking them if he wanted to challenge Ronnei's decision. Furthermore, issues relating to available review processes are outside the scope of this proceeding. In this case it must be determined if petitioner was removed from his employment for purposes of the VPA. Petitioner's other procedural rights and arguments relating to them are not within the scope of that inquiry.

J.L.L.